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**MARKET ACCESS AND
ENVIRONMENTAL PROTECTION:
A NEGOTIATOR'S POINT OF VIEW**

by

Andrew Griffith, Counsellor
Canadian Mission
Geneva

October 1997

*Department of Foreign Affairs
and International Trade*

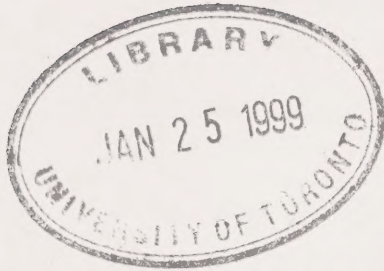
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This paper is intended to foster discussion of international trends and issues by foreign and trade policy officials. The opinions expressed are not necessarily those of the Government of Canada.

Please address any comments and questions concerning this paper to Trade and Economic Analysis Division (EET), Department of Foreign Affairs and International Trade, 125 Sussex Drive, Ottawa, Ontario K1A 0G2. (Tel.: (613) 996-8390; (613) 944-0367; fax: (613) 944-0375.) For copies of this paper, please contact the Department's Info Centre (SXIS) (1-800-267-8376; Ottawa region tel: (613) 944-4000 fax: (613) 996-9709) and indicate Code SP84A.

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Executive Summary

For many outside observers, particularly in the environmental and developmental non-governmental communities, the Committee on Trade and Environment's (CTE) report to the 1996 Singapore Ministerial of the World Trade Organization (WTO) is at best anodyne if not a major disappointment. This paper, written from the trade negotiator perspective, outlines the negotiating dynamic of the preparation of the CTE report as well as the internal policy formulation and negotiating strategy of the Canadian delegation in the lead-up to the Singapore Ministerial.

The horizontal nature of trade and environment issues, cutting across all WTO Agreements, combined with the need to integrate environmental policy considerations, means that these results must be seen in perspective. Most delegations to the WTO are composed only of trade officials with limited consultations with environmental colleagues. This, combined with concern over possible protectionist abuse of increased scope for environmental measures as well as lack of negotiating coinage within the CTE and in the WTO as a whole, limited the degree to which delegations were prepared to consider possible rule changes or interpretations.

Moreover, the dynamics between delegations, the Chair and the Secretariat further complicated the negotiations. In contrast to most negotiations, where small informal drafting groups are used to address specific issues or problem areas, the CTE was largely condemned to an open-ended drafting process.

For Canada, the two priorities were multilateral environmental agreements (MEAs) and ecolabelling. The Canadian position on both issues evolved considerably during the CTE process, reflecting greater interdepartmental understanding of the issues and alternative approaches, as well as the need, from both environmental and trade policy perspectives, to develop proposals that reflected these two policy perspectives.

The MEA issue dominated discussions of the CTE, given the impact that any possible accommodation for MEAs (i.e., where MEA provisions would "over-ride" WTO provisions) could have on WTO Agreements. Many countries were thus concerned over any possible erosion of market access commitments negotiated under the WTO. Proposals ranged from a relatively liberal "environmental window" approach of the European Union (the *demandeurs*) to the restrictive waiver approaches of ASEAN and Hong Kong. WTO jurisprudence also evolved in a manner that provided greater clarity and flexibility for environmental measures, contributing to United States disengagement on the MEA issue and thus further complicating the negotiating dynamic.

Canada's position evolved from a waiver to a guidelines based approach. Moreover, Canada developed a matrix comparing the alternative approaches identified as a means to draw together common strands among the various proposals as well as narrowing the points of disagreement. However, the negotiating dynamic did not allow for significant movement and it was only in the

final week of the negotiations that the CTE, in a small informal setting, was finally able to agree on some basic, yet helpful, political messages on MEAs. Among the key points were:

- need for policy coordination between trade and environmental officials;
- WTO and MEAs are equally representative of shared international goals;
- trade measures may be needed to achieve environmental objectives;
- WTO provides considerable scope for the use of trade-related measures, including, implicitly, WTO inconsistent measures;
- encouragement to consider resolving disputes within an MEA; and,
- flexibility of existing dispute settlement provisions.

Canada led on ecolabelling, given trade concerns with the impact of some ecolabelling programs with respect to pulp and paper exports, as well as environmental policy interests given the Canadian Environmental Choice ecolabelling program. The issue - and dividing line among delegations - essentially was the degree to which the WTO, and in particular the Technical Barriers to Trade (TBT) Agreement, could accommodate non-product related process and production methods (PPMs) that sometimes arise in ecolabelling programs. There was strong general support for ecolabelling programs to follow the transparency provisions of the TBT Agreement. However, most delegations were unwilling to provide any accommodation for non-product related PPMs given the impact this could have on the basic GATT/WTO concept of like-product.

The Canadian position itself evolved when the interdepartmental community recognized that it was not possible to advocate full TBT disciplines without, subject to certain conditions, an accommodation for non-product related PPMs. Canada also notified its own ecolabelling program. The Canadian negotiating strategy evolved, from an explicit link between TBT disciplines and an accommodation to a staged approach by which TBT coverage would be decided prior to Singapore and PPMs would part of a follow-on program. Canada made extensive use of outside experts and reports to demonstrate the degree to which its ecolabelling proposal reflected market and business realities.

The final round of negotiations resulted in a clear political message on the need to follow TBT provisions in the design and implementation of ecolabelling programs, with an appropriate "without prejudice" reference to the non-product related PPM issue. It was not possible to secure agreement on a specific reference in the future work program to the non-product related PPM issue but, as the fundamental issue and the subject of the "without prejudice" reference, this will likely be the focus of future consideration of ecolabelling.

Other CTE issues included market access, trade-related intellectual property (TRIPs), domestically prohibited goods (DPGs), and transparency. All played out in the negotiations given that they reflected the concerns of a number of delegations but with somewhat anodyne results.

Overall, all delegations were aware of the bottom line that it was in the interest of the WTO, as an organization, to have a report in the Singapore Ministerial Conference that most

delegations could defend back home. As a result, the CTE Singapore report goes much further than previous GATT reports in acknowledging the legitimacy of environmental policies, at both the multilateral and domestic levels. This is particularly the case with respect to MEAs and ecolabelling where real, if incremental, progress was achieved.

The challenge for the future is to ensure greater balance in the discussions through development of greater understanding among delegations of environmental policy issues. Greater use of experts, from both the intergovernmental and non-governmental community, can assist this process of policy integration, and thus set the stage for less polarized possible future negotiations. In this context, the Singapore report should be seen as the beginning, not the end, of the process.

MARKET ACCESS AND ENVIRONMENTAL PROTECTION: A Negotiator's Point of View*

At the Marrakesh Ministerial in April 1994, Ministers gave the World Trade Organization (WTO) a mandate to examine the relationship between the multilateral trading system and environmental policies and measures, and whether any modifications to the trading rules were required to make trade and environmental policies mutually supportive (Annex A). This decision followed three years of preparatory work in the *Ukawa* and Environmental Measures and International Trade (EMIT)¹ groups of the GATT and, as such, public expectations for the WTO Singapore Ministerial of these discussions and negotiations were high.

As the "oldest" of the new trade interface issues, the WTO's treatment of trade and environment can provide some indication of its capacity to address such complex horizontal issues. In retrospect, public expectations for the Committee on Trade and Environment (CTE) underestimated the challenge of policy integration in an international context. There was a very real conflict between the stated environmental policy objectives with respect to the use of trade instruments of the *demandeurs* of trade and the environment - primarily the USA and EU - and the more defensive orientation of other developed and developing countries, which focussed more on the perceived threat to existing WTO rights and obligations posed by multilateral and national environmental policies.

From a negotiating perspective, there were not many internal trade-offs on the table, and no non-trade and environment negotiations to balance off for concessions within the CTE. Thus there was little incentive for a number of countries to engage in serious discussions or negotiations. The CTE was in effect a sectoral negotiation but without the traditional incentive of enhanced market access to drive the negotiations.

In contrast to the policy orientation of the OECD, the WTO is less comfortable with such cross-cutting policy issues given the contractual bias of trade negotiations. In this context, and given the reality that most WTO Members have limited policy coordination between trade and environment ministries, a "balanced" result was most improbable. Moreover, being held in the WTO, the dialogue tended to be dominated by trade specialists and concerns, unlike the comparable OECD process where both trade and environmental specialists and concerns were well represented. This is not unique to the WTO; the same asymmetry from a different perspective is common to many multilateral environmental negotiations.

This article will focus on the two issues discussed within the CTE of greatest interest to Canada: multilateral environmental agreements (MEAs) and ecolabelling.

* This presentation represents one negotiator's recollection of the CTE negotiations. As such, the views presented should not be considered as definitive or authoritative.

Canadian Priorities:

For Canada, the initial approach to the issues was largely defensive but not in a negative sense. Given the importance of our natural resource sector, the focus was on concerns over efforts by other countries to determine Canadian domestic environmental policies through trade measures. The dangers of protectionist abuse of environmental policies were clear. The challenges faced by the forest products sector to adapt to changed market requirements, whether these be with respect to harvesting practices, bleaching processes, or recycled content were the clearest examples. Canada had good reason to approach the discussions with some caution.

Within the Canadian federal government, there were a range of views. Environment Canada had been pro-active as operator of Canada's ecolabelling program, Environmental Choice, and in the negotiation of international environmental agreements (MEAs) in cooperation with the Department of Foreign Affairs and International Trade. Industry Canada was obviously less enthusiastic and cited the ban under the Basel Convention on recyclables, the European Union ecolabelling program, and some domestic environmental policies as reasons for taking a more defensive posture. However, it viewed the discussions as an opportunity to develop disciplines on the use of trade measures to achieve environmental objectives. Agriculture and Agri-Food Canada and Natural Resources Canada also reinforced this defensive orientation, as did the trade policy specialists within the Department of Foreign Affairs and International Trade.

Canada, however, had no grand design for the CTE. The approach to policy and negotiating position development was incremental and reflected increased interdepartmental understanding of the issue. While there was a general objective to "do something" on ecolabelling that would make ecolabelling programs subject to the disciplines of the Technical Barriers to Trade (TBT) Agreement, it was unclear about how this could be done and what trade-offs might be required, both internally and in the CTE. The issue of MEAs was a lower priority; at one point of time, this was viewed as merely providing negotiating leverage for ecolabelling rather than a horizontal issue of real importance to Canada.

In 1992, Canada also helped establish a group of like-minded countries, the Point du Jour group, that shared this initial defensive orientation, as a means to share information, compare notes and, where possible, coordinate interventions. While information sharing remained a valuable role throughout, the coordination occurred mainly during the time of the EMIT group and the first stage of deliberations of the CTE. As the CTE moved into the negotiation phase in the lead-up to the Singapore Ministerial, positions diverged and the Point du jour role was limited to information sharing.

The technical and overly abstract nature of the trade and environment interface, particularly with respect to MEAs where the absence of actual trade disputes was cited as proof that this issue was more theoretical than real, made better understanding of the issues within government more difficult. While the political importance of the issue, both domestically and for the WTO, was recognized at all levels within the Department, the complex nature of the substantive issues, in the absence of a negotiation with real immediate Canadian interests at

issue, reduced senior level attention. This is in sharp contrast to NAFTA, where there were real negotiations on trade and environment, requiring senior official and Ministerial attention, both in terms of the NAFTA itself and the side agreements.²

CTE process:

One can divide the CTE process into four main phases:

Positioning: The first year of the CTE in 1995 began as most initial phases do, by long general policy statements, and the setting out of initial positions of delegations on individual agenda items. The Secretariat prepared background documents to provide delegations with the basis for more sophisticated analysis. This phase, however, largely resulted in negotiating markers being laid down rather than undertaking a more objective working through of the issues or better appreciating the real environmental concerns.

Proposals: The tabling of position papers and non-papers early in 1996 focussed the CTE discussion in terms of proposals to address specific agenda items. This was perhaps the most creative phase of the CTE when many delegations made the serious efforts at policy integration in their domestic policy process, necessary to allow them to table formal or informal proposals. This phase allowed for some real debate (in capitals as well as in the CTE) over various options under each agenda item, although the debate was overly formal and ritualistic. The disengagement of the USA became particularly pronounced, as it became increasingly critical of proposals presented by other delegations.

Counter-reaction: By June, however, the counter-reaction had set-in and the CTE moved to the "moving backward" phase. While papers continued to be presented, in many cases they came from delegations that did not have or appear to have domestic policy coordination, and thus largely reflected a defensive, largely trade ministry perspective. The EU in this phase became less engaged as it became clear that their original ambitions were unrealistic and arriving at revised formal EU positions very difficult. The contradictions between the positions taken by some governments in environmental fora, and by the same governments in the WTO, became even more apparent. The Chair's bilateral consultations in August represented the end of this phase.

Salvaging the possible - the endgame: By September, the stage was set for redefining the minimum, as any hopes for substantive results had vanished and the focus had shifted to the search of positive, political messages. In this phase, particularly the intensive negotiations of October and early November, the debate was essentially whether or not the Committee could agree on any such positive messages or whether the report would only remain a factual recounting of the debates over the past two years. Here, the main *demandeurs* - the EU and USA - were still stretching the limit of what was possible but in the context of much more modest ambitions. The sequence of events in the endgame are of interest and are as follows:

12 September: The Chair reports on his "findings" from his bilateral meetings, and suggests drafting of conclusions and recommendations in plenary session without any draft on table. There is a near revolt by CTE Members as they instruct the Chair to work closely with Secretariat on draft for CTE's consideration.

23 September: The Chair tables draft conclusions and recommendations. From discussions with Secretariat, it becomes clear that he has significantly changed a more neutral, less ambitious Secretariat draft. The developing countries are livid, viewing document as pandering to USA and EU interests. The middle countries (e.g., Canada, Brazil, Australia, Korea, New Zealand, Japan) are relatively comfortable with the draft.

2-4 October: The first reading of the draft conclusions and recommendations. Some developing countries tabled an alternate draft, which after some procedural wrangling, is largely forgotten. The developing countries, led by India, Egypt, and ASEAN, appear to be aiming for extreme minimalist conclusions.

10 October: The revised draft conclusions and recommendations which, while containing much of the substantive content of the 23 September draft, are more neutral. The revised draft of Sections I and II are also reissued, these incorporates written comments by delegations on earlier drafts. Again, the developing countries feel the Chair has intervened too strongly and are unhappy with draft.

17-30 October: This session sees Intensive informal open-ended discussions on draft conclusions and recommendations, as well as factual parts of the report. Discussions do not go well, with efforts by a number of delegations to rewrite history, and there is no emerging consensus on conclusions and recommendations.

31 October - 1 November: The Chair leaves for G15 meeting. Informal drafting groups, assisted by Secretariat, meet on MEAs, ecolabelling, market access and TRIPs appear to make some progress. Ecolabelling is close to a consensus text. The MEA issue appears far from resolution.

November 6: The Chair returns and starts a 24 hour drafting marathon. In contrast to previous sessions, it is largely only trade policy negotiators in the room. Initial discussions do not appear promising as delegations remain far apart and are restating positions. The drafting group on TRIPs (EU, USA, Brazil, India) meets at 3 AM for one hour. After that the blockage appears gone and in the remaining hours the text is cleaned up with all delegations demonstrating considerable flexibility.

Negotiations issue by issue:

MEAs:

The MEA issue continued to prove the most difficult issue for the WTO, given the potential for an MEA to impact on a number of WTO provisions. In essence, the issue is under what circumstances or conditions can the provisions of an MEA prevail over the provisions of the WTO and thus derogate from the contractual rights and obligations negotiated in the multilateral trading system, particularly with respect to disputes between two WTO Members, one of which is a non-party to the MEA. While the debate has been somewhat theoretical to date given lack of MEA-related disputes in the WTO, the institutional issue of compatibility of two separate systems of international law remains a central issue.

Part of the problem for the CTE was the lack of clarity from governments acting in the context of multilateral environmental community of what was required - the lack of an authoritative multilaterally-agreed statement stating when and how trade measures were required in MEAs set the stage for competence issues to arise. Without such clarity, the efforts by delegations presenting proposals for an accommodation invariably had to develop their own specific conditions, with the result that the demandeurs would then counter that this "conditionality" was more within the competence of the environmental community than the WTO. Needless to say, the implied case-by-case consideration of environmental negotiators of how and when trade measures should be used only increased the inherent conservatism of the trade policy officials that comprised most national delegations. Many of these would thus often state that an accommodation for MEAs was a solution searching for a problem given the lack of WTO disputes involving MEAs.

An additional issue, largely undiscussed, was that the weakness of MEA compliance and disputes settlement mechanisms, in sharp contrast to the binding dispute settlement mechanism of the WTO, increased the risk that MEA related-disputes would be brought to the WTO given lack of effective alternatives. While there has never been an MEA-related dispute in the WTO, this potential remained an issue of concern to many delegations, including Canada.

The MEA issue was clearly the EU priority. The EU tabled its environmental window proposal based upon the Article XX general exceptions at the February CTE and throughout the proposal phase was engaged in pressing its proposal. The USA appeared to lose interest early on and, in increasingly acerbic tones, criticized all other MEA proposals, including those from delegations that were making a serious attempt at policy integration. Following the Appellate Body report on reformulated gasoline³, the USA became even more explicit in its view that any possible result from the CTE process could only be more restrictive than the now better clarified status quo. The EU also started to disengage in the counter-reaction phase, and in one telling short intervention at the July CTE⁴, appeared to join the USA in terms of its assessment of the implications of the Appellate Body report in terms of what Article XX meant substantively for MEAs while noting that the legal relationship remained to be clarified.

The horizontal nature of the MEA issue meant that all delegations took an interest. Eight delegations tabled papers or non-papers, providing the CTE with a wide array of options, ranging from the open "environmental window" of the EU to the restrictive waiver approaches of ASEAN and Hong Kong. New Zealand presented the differentiated approach to accommodation, establishing criteria that would apply in a differentiated fashion depending on whether the dispute in question was between parties, between parties and non-parties, and whether the trade measure in question was specific or not. Korea simplified New Zealand's analytically thorough but complex proposal. Switzerland made a useful contribution by presenting a listing approach, somewhat analogous to NAFTA. Japan prepared a non-paper on a guidelines-type approach. India presented a non-paper based a status quo interpretation of Article XX and dispute settlement provisions that appeared, lack of Appellate Body reference aside, ironically similar to the USA position. Part of the interest of some delegations appeared tactical, to be used as a bargaining chip for other agenda items.

As noted earlier, the Canadian starting position on MEAs was largely defensive. While in NAFTA, we had agreed to an explicit Article XX-based accommodation, limited to the situation between parties in the case of 3 existing MEAs with trade measures⁵, the waiver approach was favoured in the multilateral setting until relatively late in the game. However, the experience with the negotiating process of the Basel Amendment on the prohibition of hazardous waste shipments from industrialized countries to developing countries of September 1995 (which Canada opposed)⁶, made it clear to the interdepartmental community that Canadian interests could be better served by considering possible options that might serve to reduce the risk of such future decisions.

Canada developed a two-track approach. First, we formally abandoned the waiver approach, recognizing that an approach based upon Article XX was more consistent with GATT philosophy.⁷ This also provided for greater dispute settlement rights, given that such rights would be significantly reduced under the waiver approach.⁸ Canadian interdepartmental discussion indicated that a guidelines approach could provide an accommodation for MEAs such as the Montreal Protocol or CITES while not providing an accommodation for flawed MEAs such as the Basel Amendment. In our development of guidelines, we were influenced by some earlier suggestions made by Australia. We made an analytical distinction between "qualifying principles" which pertained more to defining which MEAs would qualify for accommodation and a "checklist" of GATT/WTO principles that MEA negotiators should consider when reviewing the possible need for trade measures. We never, given that the dynamics of the CTE did not require it, fleshed out these ideas in a formal proposal or finally decide on whether these guidelines should be in the form of "soft" law or a more formal understanding.

Part of the reason for not elaborating formally the guidelines approach was our assessment that there were already enough proposals on the table and any additional proposal would only serve to confuse what was already a complex issue. Needless to say, this would also have been difficult to "crunch" interdepartmentally.

Secondly, Canada made a detailed analysis of the various proposals presented to the CTE in matrix form, to simplify the policy orientation of each approach.⁹ This matrix was circulated to the Point du jour group and all delegations that had presented proposals, as a way of ensuring that Canada understood the proposals but, and more important, to suggest that there were points of convergence as well as points of divergence in the various proposals. In particular, it was noted that there appeared to be consensus in favour of accommodation for situations of specific measures taken between Parties and no support for accommodation for non-specific measures, in both the between Parties and Parties-non-Parties scenarios¹⁰. And obviously, there was no support for accommodating unilateral measures.¹¹ There was also considerable support for increased cooperation between MEAs and the WTO. The main area of divergence was with respect to Parties-non-Parties where opinion was divided. This had some resonance at the CTE June meeting when the Canadian delegation outlined the results of the analysis.¹² It was noted that the guidelines approach could be merged with most of the proposals presented to date.

During early July, the Chair tried to achieve progress on the MEA issue by asking Canada to coordinate a "drafting" group composed of delegations that had submitted papers on MEAs to the CTE. While Canada agreed to this suggestion by the Chair, this was prior to the papers of ASEAN, Hong Kong and India. Membership in the group, as many delegations (including Canada) indicated to the Chair, was thus too limited to serve as the basis for consensus. While this group produced an "issues" sheet, the limited membership allowed delegations to dismiss its work on process grounds.

The counter-proposals of ASEAN and Hong Kong then arrived, along with the status quo Article XX proposal of India. Australia then "blew the whistle" at the informal on July 25th, by noting that at this late stage the best the CTE could do was to develop political messages rather than resolve contradictions between proposals. At the time, many delegations found Australia's remarks premature and counter-productive given that they effectively suggested closing the debate.¹³

The Chair tried to float a number of ideas in bilaterals in late August but there was no support.¹⁴ The USA picked up on Australia's suggestions, albeit somewhat tendentiously, at the September 11 meeting. Expectations for the draft conclusions and recommendations, following rejection of the Chair's "findings" and the clear message to the Chair to work closely with the Secretariat to prepare a draft, were modest.

As noted earlier, the draft recommendations presented on September 23 were relatively ambitious in relation to the now diminished expectations - but certainly too ambitious for most developing countries. The revised draft of October 10 was more concise and focus, but conserved much of the substance. This was the basis for much of the ensuing negotiations until October 30. For the first time in the CTE, there was a real and detailed exchange of views on specific points pertaining to MEAs.

The Chair requested a small group chaired by Richard Eglin of the WTO Secretariat to try drafting the central substantive paragraph pertaining to points the CTE had "identified" with

respect to MEAs. Following the Chair's departure, its mandate was broadened to include the entire MEA section. The Secretariat then prepared a draft, that while not an agreed text, nevertheless took into account the views expressed by delegations with a minimum number of square brackets. This November 1st draft was the basis for the marathon negotiating session -and once again, much of the substance of the October 10 draft had been preserved, albeit in more neutral and balanced terms.¹⁵

In the marathon session of November 6-7, discussion focussed on a number of issues. First, the issue of consistency with WTO rules when trade measures were considered for inclusion in a MEA. The debate ranged between those who wanted to ensure that MEA trade measures were consistent, to those that wanted governments to consider whether the trade measures were consistent (i.e., governments could decide to "override" consistency), and the USA/EU formulation that governments should consider the relation between the trade measures and WTO rules. No consensus was possible and reference was dropped in final report.

There was also no consensus in terms of possible approaches to future work on MEAs (e.g., whether to focus on issues related to parties/non-parties) and thus the reference to future work in paragraph 176 of the final report is deliberately general.

Dispute settlement (paragraph 178 of the final report) was equally contentious. The issue was largely the degree to which WTO Members could send a positive signal to the environmental community by urging WTO Members to not undermine MEA objectives through recourse to WTO dispute settlement. Canada tabled a reference that noted that more effective compliance and dispute settlement mechanisms within MEAs would encourage resolution of any disputes within the MEA. Developing countries such as Nigeria tabled drafting suggestions that stressed the right to WTO dispute settlement. In the marathon negotiating session, the text had become hardened by making the reference to "always" having the right. USA led the opposition to such a categorical formulation, noting that in certain circumstances, WTO Members may have waived WTO rights, a point supported by most OECD countries. There was no consensus on this paragraph until the end when the USA and others, given the hour (8 AM) and movement on other issues, resigned themselves to the final formulation.¹⁶

On November 7, much of the core "factual" part of the draft survived with the more contentious political or "spin" messages disappearing between 7 and 9 AM. This final draft language, as in other sections of the report, was adopted by the CTE unchanged on November 8, with a number of delegations making statements for the record where they disagreed with certain aspects of the report. However, key messages that remained include:

- need for policy coordination between trade and environment officials;
- WTO and MEAs are equally representative of shared international goals, and due respect must be offered to both;
- trade measures may be needed to achieve environmental objectives;
- WTO provides considerable scope for the use of trade-related measures, including, implicitly, WTO inconsistent measures;

- disputes between parties to a MEA are unlikely to create problems for the WTO, encouragement to consider resolving disputes within an MEA; and,
- flexibility of existing dispute settlement provisions.

While Canada had argued strongly in favour of the stronger language of the November 1st draft, the preservation of the core messages above is not without significance, given that it establishes the parameters for future discussion.

Ecolabelling:

Canada took a leadership role on this issue given our trade concerns, largely with respect to the EU and its member-state eco-labelling programs, particularly the EU Flower program, as well as our environmental policy objectives, with respect to the Canadian Environmental Choice eco-labelling program. Many developing countries shared the trade concern, given that many ecolabelling programs included products of export interest to them, such as forest products and textiles. A key ally was Brazil, given their sophisticated understanding of the issues and their shared concern with respect to forest products. While all delegations agreed on the need for transparency, the dividing line was whether or not the WTO and, in particular, the TBT Agreement, accommodate the use of non-product related PPMs¹⁷ that sometimes arise as the result of life cycle approaches (LCA) being used with respect to the development of ecolabelling criteria.

Ecolabelling was also a priority issue for the EU which made a link between transparency (i.e., coverage by the TBT Agreement) and PPMs, noting the need to provide legitimacy to the use of life-cycle approaches (LCA). This reflected their defensiveness regarding their own ecolabelling program which has attracted considerable criticism by trading partners, including Canada, but also the more fundamental environmental policy objectives regarding the use of LCA. The EU thus argued for a separate accommodation of ecolabelling programs through a Code of Conduct, rather than "mainstreaming" ecolabelling within existing TBT disciplines.

Canadian concerns over the trade impact of ecolabelling pertain largely to the perceived or potential impact of European ecolabelling programs with respect to our forest products sector. However, at the same time, Canada had developed its own ecolabelling program, and thus the policy challenge was to develop a negotiating position that satisfied both our trade and environmental interests.

In the positioning phase, we emphasized the transparency and coverage aspects of ecolabelling and the need to ensure that such programs were subject to TBT disciplines. This position generated considerable support among developing countries, given their experience with ecolabels in sectors such as textiles, leather, and forest products. The EU was our main sparring partner. We did not speak of non-product related PPMs but rather the softer reference to life cycle approaches.

However, as we prepared our formal CTE/TBT proposal, we internally realized that our position was not coherent nor consistent with trade and environmental policy integration. Interdepartmental agreement was reached, not without considerable argument, for a proposal that argued that ecolabelling programs were covered by the TBT Agreement and its Code of Good Practice but that the TBT Agreement should be interpreted as providing accommodation for the use of non-product related PPMs, provided that such PPMs are developed in a manner consistent with international guidelines currently under development. Given that this accommodation would in effect legitimize distinctions between products on the basis of how they were produced (i.e., in contradiction to the “like products” concept of GATT Article III), this required the “safeguard” of reference to international guidelines given the potential for protectionist abuse of such distinctions.

When Canada presented this proposal in February,¹⁸ reaction was predictable. There was strong support for our arguments in favour of TBT coverage but strong opposition for our suggested accommodation for non-product related PPMs on the part of developing countries. The EU, while welcoming our recognition of the validity of life cycle approaches and thus of PPMs, maintained its preference for a separate Code of Conduct for ecolabelling programs.

Parallel to consideration of various negotiating positions, we used experts to inform delegations on ecolabelling and related issues. The CTE held a joint session with the TBT Committee where various ecolabelling programs were presented, including those of Canada, the EU, the Nordic countries and the alternate approach of the USA regulation of environmental claims. We also had arranged separate visits of our ecolabelling practitioner as well as the ISO Secretariat responsible for the development of the ISO 14000 environmental management standards to help educate delegations on the practical issues related to ecolabelling.

Domestically, we also consulted extensively with an ecolabelling working group of our International Trade Advisory Task Force on Trade and Environment, whose membership, although weighted toward business, nevertheless included some environmental NGOs and consultants. We also consulted directly with the Canadian Pulp and Paper Association to ensure that our messaging with respect to business concerns was accurate.

From February to June, the CTE was largely silent on ecolabelling as discussion focussed on other agenda items. Based upon bilateral discussions with many delegations as well as discussions in the Point du jour group, we refined our original proposal. Rather than maintaining the explicit link between TBT coverage and an accommodation for non-product related PPMs, we proposed in June a phased approach whereby we would agree on coverage now and address non-product related PPMs post-Singapore. To show that we were consistent with our position on coverage, we notified Canada’s Environmental Choice program under the TBT Agreement. Environment Canada accepted the need for this refinement but stated the need to ensure that PPMs were taken up post-Singapore. A draft decision was tabled to that effect in July.

At that point in time, support for our approach softened. Delegations that had previously spoke in favour of transparency now appeared to follow the EU line that one could not separate

transparency from PPMs.¹⁹ Some developing countries such as Egypt and India were opposed to TBT coverage, fearing that this could imply that non-product related PPMs were not only covered by the Agreement but legally allowed as well. Japan and Korea expressed support for elements of the EU position, with Korea rejecting the phased approach. Delegations such as ASEAN stated that they were not willing to discuss PPMs "not now, not ever". The USA, which had been supportive in earlier discussions, appeared to be backing off given their own inter-agency differences on labels based upon non-product related PPMs. Only Brazil and Argentina provided strong support.

There was also fear on the part of some developing countries that this could open the door to non-product related PPMs related to labour standards, given the push that the EU, USA and Norway were making for some discussion within the WTO on this highly contentious issue.

Over the summer, we debated how best to approach the fall session. Our bilateral consultation with the Chair in late August made it clear to us that he was considering a "TBT minus" solution on ecolabelling that would mean a reduction in current TBT disciplines on those aspects of ecolabelling that were not based on non-product related PPMs (i.e., ecolabels based upon energy efficiency or water consumption, equivalent to any other performance-based standard covered by the TBT Agreement, would be subject to reduced discipline compared to the status quo). With this in mind, we developed a twin-track strategy: first, stronger representation and refutation of counter-arguments to our ecolabelling proposal; and, secondly, consideration of alternate WTO mechanisms such as Article XXII consultations to address the coverage issue.

This new approach was deployed bilaterally, plurilaterally, and in the CTE itself. We made it clear to the Chair that TBT minus was not acceptable and stated this in the CTE. We made a long comprehensive rebuttal to counter arguments in September's CTE, and, in a direct reference to those developing countries that had been most critical of our approach, made explicit reference to how their export industries were adapting to ecolabels based upon non-product related PPMs, citing relevant studies with respect to the textile sector.²⁰ At the same time, we suggested publicly that we were considering raising the issue in other WTO fora should the CTE consider a TBT-minus solution.

As we approached the final intensive round of negotiations, the situation was unclear. We did not accept the revised Chair's draft of October 10 and rather proposed that we try to work out differences bilaterally and plurilaterally with interested delegations. Our focus was on two aspects: first, a clear statement on coverage; and, secondly, a future work reference that would allow us to address PPMs.

First, we used the opportunity presented by the EU's proposed reopening of the draft TBT Committee's report to Singapore report on October 16 to sharpen the focus of the report by making it clear that the lack of consensus only applied to the non-product related PPM aspects of ecolabelling and criteria. Agreement was reached in a short 5 minute drafting session on October 22 where we proposed and the EU accepted an explicit reference to non-product

related PPMs.²¹ On October 25, previously arranged high level bilateral environmental consultations with the EU in Brussels allowed us to deliver a strong message on the importance of a credible result on ecolabelling in the CTE report.

A short side meeting with Korea on October 29 allowed us to develop two alternate drafting suggestions that addressed concerns pertaining to whether addressing transparency implied coverage and application of the Agreement to PPMs. These suggestions, following the departure of the Chair, served as the basis for a drafting group meeting on October 31. The Halloween meeting produced an acceptable if weak reference to TBT that was limited to notification provisions. On November 1, Brazil, Mexico and the USA all made suggestions to strengthen the crucial coverage paragraph (paragraph 185 of the final report) that made it explicitly clear that the only area of ambiguity was with respect to non-product related PPMs and that the reference to the TBT referred to all provisions, including transparency. The USA particularly wanted to make clear that this conclusion had no implications for mandatory labelling programs. The end result was a clear text that had a positive introductory statement on ecolabelling, appropriate focus on transparency, strong reference to TBT provisions, and future work that allowed for discussion of PPMs. This draft was acceptable to Canada, particularly given the earlier danger of a TBT-minus result.

At the beginning of the marathon negotiating session of November 6, we met Egypt and ASEAN who had not been able to participate in the November 1 drafting group. Their concern, ironically, was not with the crucial coverage paragraph but rather with the introductory paragraph (paragraph 183 of the final report), particularly the positive reference to ecolabelling programs and Agenda 21 (which had been largely agreed). There was no consensus on elements of future work (paragraph 186). We explained that we either had to list all five elements or none, given that each responded to particular concerns of delegations.²² The consensus was for a short reference to future work but one that significantly included reference to the TBT Committee and work in other fora such as UNEP, UNCTAD, ISO, OECD and ITC.

The USA and EU could not accept the weakening of the positive reference to ecolabelling and Agenda 21. We then advised interested delegations that we were going back to the original text of November 1 as the basis for negotiations. When we discussed ecolabelling late that night, Egypt raised many of the same concerns regarding the Agenda 21 reference. The compromise was to add a sentence directly taken out of Agenda 21, as originally suggested by ASEAN.²³ India made a number of small helpful drafting suggestions. The end result was a stronger and more positive introductory paragraph than in the November 6 draft.

With respect to the coverage paragraph, the EU wanted less clear wording with respect to what the "without prejudice to the views of Members" referred to - i.e., life cycle approaches rather than non-product related PPMs. The Canadian delegation intervened strongly, noting the need for precision given that life cycle approaches may or may not result in non-product related PPM-based criteria and that Canada could not accept any result that would imply that a standard developed through LCA but performance-based (e.g., energy efficiency), was not covered by the TBT Agreement. The EU later accepted this argument. Canada was, ironically, absent

between 7 and 9 AM when the final deal was struck between the USA, EU, Mexico and Brazil.²⁴

While the CTE report makes it clear that ecolabelling clearly falls within the general coverage of the TBT Agreement, it does not clarify how the WTO and TBT should address the non-product related PPM aspects of such programs. In the view of many delegations, such decision on coverage and application of the TBT Agreement is more likely to arise from a panel rather than a Committee decision, given the divergence of opinion among WTO Members. Thus, Canadian objectives on the "coverage" question were largely met, but Canada did not succeed in obtaining a specific reference to future work on non-product related PPMs.

Other CTE issues:

In addition to MEAs and ecolabelling, the following issues were addressed in the CTE. Canadian interests in these issues were limited given the assessment that many of these issues had less direct relevance to trade and environment and had been placed more as markers to provide negotiating coinage.

Market Access:

Market access included two major issues: the effects of environmental measures on market access, particularly on developing countries, and secondly, the environmental benefits of removing trade restrictions and distortions.

Developing countries were relatively inactive on the first issue, with the exception of the non-paper by India. Part of the problem was that ecolabelling, packaging and recycling requirements were part of another agenda item. A more fundamental problem was that many developing countries did not have the policy and analytical expertise to advance discussion or positions.

The second issue was largely hijacked by agriculture discussions. Argentina presented a non-paper in March that argued that removal of trade restrictions and distortions in the form of agricultural subsidies would reduce policy failures that had negative impact on the environment. Australia pursued the issue, in a more nuanced form, and tried to broaden the discussion to related issues and other sectors. The USA contributed a sophisticated economic analysis that only contributed to what was becoming an increasingly abstract debate. The extreme defensiveness of Japan and Korea, combined with the more sophisticated arguments of the EU and Switzerland, essentially resulted in a stalemate with the drafting, both in the open-ended informal meetings and the drafting groups, becoming more and more inward looking.²⁵ Canada stayed largely out of the discussions, given our focus on other issues, our own sensitivities in agriculture, and the realization that the balance of interests in the room would not result in a substantive result.

Particular points of sensitivity included how to characterize the role that environmental policies play in ensuring that trade-induced growth is sustainable. The key point here for many countries, both developed and developing, including Canada, was that market access should not be conditional on environmental policies. The compromise language addresses this concern largely through making reference to the environmental policies determined at the national level. Paragraph 198 of the CTE Report created considerable debate over how to acknowledge the reality that discussions had focussed on agriculture while addressing the sensitivities indicated above.

The market access conclusions must be considered particularly anodyne for an organization whose prime competence lies in trade liberalization.

TRIPs:

TRIPs became, as predicted, largely an issue between India and the USA. India tabled its first of three non-papers in May that appeared to suggest reopening the TRIPs Agreement with respect to environmental technologies with respect to compulsory licensing, patent protection and trade secrets. Formal reaction was largely limited to the USA but a number of other countries, Canada included, indicated our concerns bilaterally. Canadian concerns were primarily that MEA-related environmental technology transfer issues should be addressed in the context of that MEA and that reopening compulsory licensing for one sector - environmental technologies - was not politically possible given that we had closed it for another - pharmaceuticals.

India appeared to send signals that it had heard the message and re-stated that its intent was not to re-open the TRIPs Agreement. However, its second TRIPs non-paper, tabled in June, was even stronger, which obliged more countries to question the Indian approach in formal meetings. The paragraph-by-paragraph critical commentary by the USA was joined by more general remarks of concern by Switzerland, Canada and the EU. Canada noted in particular the existing balance within the TRIPs Agreement between holders of intellectual property and abuse of monopoly power concerns. Korea also tabled a non-paper describing their concerns with respect to the Montreal Protocol but quickly issued a corrigendum at the same meeting to reduce any risk that they might be accused of re-opening TRIPs and ensure that their position was distinct from India's. No countries supported India although ASEAN made one short general remark of support without any follow-up.

The second issue for which there was greater interest was the relationship between the Biodiversity Convention and the TRIPs Agreement, particularly with respect to indigenous knowledge. Australia, Brazil, and Canada all expressed some interest in further discussions on this issue. India tabled a paper on Biodiversity that went beyond what most delegations believed was reasonable. The USA made a predictable paragraph-by-paragraph rebuttal.

In the negotiations, it became increasingly clear (and as expected from the beginning) that TRIPs would become a bargaining chip. The drafts prepared by the Chair struck a middle-

ground but there was no real movement until a drafting group, comprised of Brazil, EU, India, and the USA, met over dinner on October 31. The draft, largely penned by Brazil, was rejected by India and was not included in the November 1 negotiating text. However, the marathon negotiating session suspended negotiations between 3 and 4 AM to allow for a separate meeting of the drafting group.²⁶ The end result is a conclusion which while not prejudicing future work on TRIPs, nevertheless provides a few markers that delegations can develop should they so choose.

Environmental Assessments:

Surprisingly, while USA participated in all agenda items, their one priority in the final stages was environmental assessment of trade agreements. The USA, based upon their experience with national environmental reviews of the NAFTA and the Uruguay Round, wanted language encouraging environmental reviews and CTE consideration of methodologies to carry out the same. Not surprisingly, and despite past OECD work and guidelines in this area, their proposal developed little support but a reference to future work in the final CTE report.

Transparency:

Hong Kong led on what was a relatively non-controversial item as transparency is fundamental to implementation of the WTO Agreements. However, whenever the suggestion was made in a manner that appeared to alter existing obligations (as in the case of ecolabelling under the TBT Agreement) or expand the scope of environmental considerations (as in the case of a reference to the Trade Policy Review mechanism continuing its current practice of including trade-related environmental policies in country reports), many developing countries became skittish.

Domestically Prohibited Goods (DPGs):

Nigeria took the lead with unclear support from other African delegations. The EU at one time appeared to view this as a bargaining chip but given limited interest by other developing countries, the DPG issue was "tolerated" rather than advanced. During the open-ended negotiations, there was open disagreement between Morocco, Egypt and Nigeria with respect to whether DPGs were the sole responsibility of the exporting country or whether responsibility was jointly held between the exporter and importer. The drafting compromise was to drop this reference but given that Nigeria was not present when that decision was taken, Nigeria formally raised its dissatisfaction on this and related points at the formal CTE meeting that adopted the report. India placed a TRIPs marker under DPGs that evaporated once the drafting group had resolved the more contentious issues.

Services:

Following EU enlargement, the interest in services that had been previously expressed by Austria was submerged by EU and Commission interests. No real environmental issues in the services field were ever really identified although there was suggestions that such issues might exist in the transport and tourism service sectors.

Transparency/Participation:

The USA was the main *demandeur* on the question of participation of NGOs in the work in the CTE. There was greater support for enhanced transparency but decisions in the end were handled by the WTO General Council. This issue remains an ongoing challenge for the WTO given that lack of transparency and, in particular, a restrictive document derestriction policy, hamper the WTO's credibility in the larger international community, particularly with NGOs.

Other observations:

As pointed out by one delegation that played a constructive if cautious approach, the process developed by the Chair ran completely counter to normal WTO practise. Instead of developing conclusions and recommendations on the basis of the factual report, he successfully insisted on "concurrent engineering" and a parallel process. This parallel process was supported by developed countries and some developing countries as the only means by which to reach conclusions. However, he was not able to draw together the considerable efforts by many delegations to provide possible approaches for individual agenda items. At times, developing countries suspected that the Chair had his own separate agenda, which likely contributed to a number of the counter papers being presented. This perception also was reinforced by his presentation of findings in August and September, and again contributed to the counter draft of October 2. However, in the end, efforts by some developing countries to force a sequential approach to developing conclusions and recommendations did not succeed, given that other delegations shared the view of the Chair that the conclusions and recommendations section was on a different level than the factual section. This difference of views did mean considerable procedural wrangles and quite often tumultuous sessions, but did not derail the process. In the end, the Chair achieved more ambitious results than might otherwise have been possible.

This dynamic was complicated by the lack of cooperation between the Chair and Secretariat. It was clear to most delegations that the Chair had substantially rewritten the Secretariat draft negotiating text, and virtually all delegations stated the need at the September 12 meeting for the Chair and the Secretariat to work closely together. The role of the Secretariat in the informal drafting process of October 31 - November 1 reflects the professionalism and skill of the Secretariat in developing the basis for a consensus text.

The Chair was also not able to use informal drafting groups as effectively as possible, perhaps reflecting the fact that he may have felt "burnt" by his efforts in July to create small

groups. The CTE was thus condemned to an open-ended process. The Chair also preferred to retain more control than necessary over the drafting process, rather than let delegations work out the issues themselves. The drafting sessions of October 31 and November 1 indicated how effective such informal processes can be, as did the TRIPs discussions held late in the marathon session. Moreover, earlier use of informal drafting groups might have reduced the need for a virtually full-time three week negotiating process in October.

Personalities of individual delegations also played an important role. In any multilateral process, the ability to draw out the process through procedural or substantive interventions is infinite when there was no real deadline other than the need for a "report" to the Singapore Ministerial Conference. The delegations present in the marathon session largely limited their interventions to substantive drafting suggestions and were clearly all working to see if consensus was possible. It was also clear that some Heads of Delegation had instructed their officials to work towards a result acceptable to all. The absence of one active delegation also facilitated the process, given the tangents that its interventions often produced.

Assessment and future challenges:

Most WTO delegations to the CTE are comprised solely of representatives from trade or economic ministries. The number of delegations that consulted and included environmental officials is limited and thus any outcomes from the WTO are unlikely to have the same balance as achieved by the CSD or the OECD joint-experts process, although from a trade or industry ministry perspective, the results may be largely satisfactory. While the WTO is less of only a trade officials world than the GATT was, given the considerably wider scope of WTO obligations, the development of this wider perspective should be viewed as a medium-term process.

While environmental policy expectations have not been satisfied, the Singapore report does go further than previous GATT reports in acknowledging the legitimacy of environmental policies, at both the multilateral and domestic levels. This is particularly the case in the section on MEAs and ecolabelling. However, the report shies away from the hard issues of defining under what terms and conditions an accommodation for MEAs should be considered and even which approach should be followed, although there is an implicit bias toward an Article XX (General Exceptions) based approach. In this regard, the flexibility in the final stage of negotiations of the proponents of a waiver approach need to be acknowledged. On ecolabelling, while the report identifies the real issue as being non-product related PPMs, and describes this in neutral terms, it does not take the next step and suggest how the WTO might come to terms with this reality of environmental policy and the marketplace.

While Canada was disappointed in the results on ecolabelling and the political messaging on MEAs, in the context of the negotiating dynamic the results are understandable. Again, this was akin to a sectoral negotiation where there was no negotiating "coinage" outside the process or the pressure of non-governmental and intergovernmental environmental bodies to provide balance. Many countries did thus not see any potential for trade-offs. In an organization that is

based upon consensus decision making, these two factors, combined with the lack of domestic policy coordination between trade and environment ministries in many countries, makes the Report's conclusions a significant achievement.

All delegations were aware of the bottom line that it was in the interest of the WTO as an organization to have a report in the Singapore Ministerial Conference that most delegations could defend back home. The end result was a report that has done that; the next step is to build upon the greater understanding of the issues engendered by the report in a balanced manner.

The challenge for the future is to ensure greater balance in the discussions of trade and environment through development of greater understanding among delegations of environmental policy issues, particularly among delegations where policy coordination between trade, environment and other relevant ministries is less well developed. Greater use of experts, from both the intergovernmental and non-governmental community, can assist this process of policy integration, and thus set the stage for less polarized possible future negotiations. In this context, Singapore should be seen as the beginning, not the end of the process.

Annex A: Marrakesh Decision on Trade and Environment

Ministers,

Meeting on the occasion of signing the Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations at Marrakesh on 15 April 1994,

Recalling the preamble of the Agreement establishing the World Trade Organization (WTO), which states that members' "relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services, while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development,"

Noting:

- the Rio Declaration on Environment and Development, Agenda 21, and its follow-up in GATT, as reflected in the statement of the Chairman of the Council of Representatives to the CONTRACTING PARTIES at their 48th Session in December 1992, as well as the work of the Group on Environmental Measures and International Trade, the Committee on Trade and Development, and the Council of Representatives;
- the work programme envisaged in the Decision on Trade in Services and the Environment; and
- the relevant provisions of the Agreement on Trade-Related Aspects of Intellectual Property Rights,

Considering that there should not be, nor need be, any policy contradiction between upholding and safeguarding an open, non-discriminatory and equitable multilateral trading system on the one hand, and acting for the protection of the environment, and the promotion of sustainable development on the other,

Desiring to coordinate the policies in the field of trade and environment, and this without exceeding the competence of the multilateral trading system, which is limited to trade policies and those trade-related aspects of environmental policies which may result in significant trade effects for its members,

Decide:

- to direct the first meeting of the General Council of the WTO to establish a Committee on Trade and Environment open to all members of the WTO to report to the first biennial meeting of the Ministerial Conference after the entry into force of the WTO when the work and terms of reference of the Committee will be reviewed, in the light of recommendations of the Committee,

- that the TNC Decision of 15 December 1993 which reads, in part, as follows:

- "(a) to identify the relationship between trade measures and environmental measures, in order to promote sustainable development;

- (b) to make appropriate recommendations on whether any modifications of the provisions of the multilateral trading system are required, compatible with the open, equitable and non-discriminatory nature of the system, as regards, in particular:

- the need for rules to enhance positive interaction between trade and environmental measures, for the promotion of sustainable development, with special consideration to the needs of developing countries, in particular those of the least developed among them; and

- the avoidance of protectionist trade measures, and the adherence to effective multilateral disciplines to ensure responsiveness of the multilateral trading system to environmental objectives set forth in Agenda 21 and the Rio Declaration, in particular Principle 12; and

- surveillance of trade measures used for environmental purposes, of trade-related aspects of environmental measures which have significant trade affects, and of effective implementation of the multilateral disciplines governing those measures;"

constitutes, along with the preambular language above, the terms of reference of the Committee on Trade and Environment,

- that, within these terms of reference, and with the aim of making international trade and environmental policies mutually supportive, the Committee will initially address the following matters, in relation to which any relevant issue may be raised:

- the relationship between the provisions of the multilateral trading system and trade measures for environmental purposes, including those pursuant to multilateral environmental agreements;

- the relationship between environmental policies relevant to trade and environmental measures with significant trade effects and the provisions of the multilateral trading system;
- the relationship between the provisions of the multilateral trading system and:
 - (a) charges and taxes for environmental purposes;
 - (b) requirements for environmental purposes relating to products, including standards and technical regulations, packaging, labelling and recycling;
- the provisions of the multilateral trading system with respect to the transparency of trade measures used for environmental purposes and environmental measures and requirements which have significant trade effects;
- the relationship between the dispute settlement mechanisms in the multilateral trading system and those found in multilateral environmental agreements;
- the effect of environmental measures on market access, especially in relation to developing countries, in particular to the least developed among them, and environmental benefits of removing trade restrictions and distortions;
- the issue of exports of domestically prohibited goods,
- that the Committee on Trade and Environment will consider the work programme envisaged in the Decision on Trade in Services and the Environment and the relevant provisions of the Agreement on Trade-Related Aspects of Intellectual Property Rights as an integral part of its work, within the above terms of reference,
- that, pending the first meeting of the General Council of the WTO, the work of the Committee on Trade and Environment should be carried out by a Sub-Committee of the Preparatory Committee of the World Trade Organization (PCWTO), open to all members of the PCWTO,
- to invite the Sub-Committee of the Preparatory Committee, and the Committee on Trade and Environment when it is established, to provide input to the relevant bodies in respect of appropriate arrangements for relations with inter-governmental and non-governmental organizations referred to in Article V of the WTO.

Annex B: MEA comparative table**

Delegation	EC	New Zealand	Swiss
Type	Article XX	Global understanding	List (global - i.e., covers all WTO Agreements)
Unilateral	No accommodation	Explicit no accommodation	No accommodation
Between Parties - Specific measures	Waive necessity test (XX b), primarily directed at (XX g), under terms of Article XX chapeau	Accommodated (MEA dispute settlement, no access to WTO dispute settlement)	Listed MEAs, accommodation as per EU. List procedures: Option 1 (informal GC Consultations, formal 50% vote), Option 2 (automatic unless objections)
Between Parties - Non-specific	Waive XX b or XX g if panel determines measure is specific	Full necessity test (effectiveness, least trade restrictiveness, proportionality)	No accommodation (measures have to be specific)
Parties - Non-Parties - Specific measures	Waive XX b or XX g if MEA meets 2 qualifying principles	Full necessity test including procedural (i.e., whether MEA reflects international consensus), environmental objective taken as given	Unlikely to be on the list under Option 1, greater possibility to be on the list under Option 2 given "automatic" listing if no formal objection
Parties- Non-Parties - non-specific	Waive XX b or XX g tests if MEA meets 2 qualifying principles, and if panel determines measure is specific	No accommodation	No accommodation (measures have to be specific)
Cooperation	Silent	Silent but support	Detailed proposal with modalities for cooperation and ongoing role for CTE

** This comparative table was prepared to facilitate discussion internally and among delegations. It should not, however, be considered authoritative or definitive with respect to the proposals made by various delegations given the degree of simplification that was required to capture the proposals in summary form.

Delegation	Japan	Korea	ASEAN
Type	Guidelines (non-binding, possible evolution to binding)	Understanding, Article XX, phased approach	Waiver
Unilateral Measures	No accommodation	Explicit no accommodation	Explicit agreement not to resort
Between Parties - Specific Measures	Likely to meet both procedural and substantive guidelines. While DSU not specified, accommodation similar to EU	Accommodation similar to EU but consensus required, explicit reference to "least inconsistency"	Waiver provided guidelines are met, 3/4 vote, resource to DSU (Article 26 "result of application)
Between Parties - Non-specific	No accommodation (measures have to be specific)	For "authorized" non-specific measures, full necessity test (least trade restrictiveness, proportionality, effectiveness), consensus required, "pursuant" measures considered unilateral	No accommodation (formal agreement not to resort)
Parties- Non-Parties - Specific measures	Although non-binding, accommodation similar to EU although guidelines are <u>much</u> more comprehensive	No accommodation, non-binding guidelines for MEA negotiators	Waiver provided guidelines are met, 3/4 vote, resource to DSU (Article 26 "result of application)
Parties- Non-Parties - Non-specific	No accommodation (measures have to be specific)	No accommodation (waiver)	No accommodation (formal agreement not to resort)
Cooperation	Proposed modalities for cooperation and ongoing role for CTE	General reference to need for cooperation and transparency	Silent

Delegation	Hong Kong	India	NAFTA
Type	Waiver	Status quo	List
Unilateral Measures	No accommodation	No accommodation	No accommodation
Between Parties - Specific measures	Guidelines to facilitate granting of waiver; necessity test exempted; 3/4 vote, negative vetting, resource to DSU (Article 26 "result of application")	Article XX (b, g and chapeau)	Article XX interpreted to include environment, parties to MEAs explicitly waive WTO rights (i.e., consensus), least inconsistency provision (Art. 104)
Between Parties - Non-specific	Full necessity test (effectiveness, least trade restrictiveness, proportionality)	Panel to rule whether measure is specific (i.e., meets XX b or g)	No accommodation
Parties- Non-Parties - Specific measures	Guidelines to facilitate granting of waiver; necessity test exempted; 3/4 vote, negative vetting, resource to DSU (Article 26 "result of application")	Article XX (b, g and chapeau)	No accommodation
Parties- Non-Parties - Non-specific	Full necessity test (effectiveness, least trade restrictiveness, proportionality)	Panel to rule whether measure is specific (i.e., meets XX b or g)	No accommodation
Cooperation	"Guidebook" on WTO principles, enhanced WTO/MEA Sec't communications	Silent	Silent

Annex C: Ecolabelling coverage paragraph evolution

September 23 (Chair):

In the meantime, the CTE recommends that Members comply fully with their obligations under the TBT Agreement in connection with the preparation, adoption and application of eco-labels by standardizing bodies under their jurisdiction and provide fair access for foreign suppliers to eco-labelling schemes and for their products to eco-labels.

October 10 (Chair):

Without prejudice to the extent of coverage of PPMs by WTO provisions, the CTE recommends that Members comply fully with their obligations under the TBT Agreement as it may be applicable in connection with the preparation, adoption and application of eco-labels by standardizing bodies under their jurisdiction and provide fair access for foreign suppliers to eco-labelling schemes and for their products to eco-labels.

October 18 (Canada):

Without prejudice to the extent of coverage of PPMs by WTO provisions, the CTE recommends that Members comply with the existing obligations of the TBT Agreement and its Code of Good Practice with respect to ecolabelling programs.

October 29 (Canada):

- a) *While there is no consensus on the coverage by the TBT Agreement of ecolabelling programs and criteria, based upon non-product related PPMs, and the extent of the application of existing TBT obligations regarding non-product related PPMs, Members are encouraged to rigorously follow the notification obligations of the TBT Agreement and its Code of Good Practice with regard to semi-annual publication of the work program of ecolabelling standardizing bodies and 60 days prior comment period for draft ecolabelling criteria by interested parties.*
- a) *While there is no consensus on the coverage by the TBT Agreement of ecolabelling programs and criteria, based upon non-product related PPMs, and, consequently, the extent of WTO Members' related obligations regarding such programs and criteria, based upon non-product related PPMs, the CTE recommends that Members rigorously follow the notification obligations of the TBT Agreement and its Code of Good Practice with regard to semi-annual publication of the work program of ecolabelling standardizing bodies and 60 days prior comment period for draft ecolabelling criteria by interested parties.*

October 31 (drafting group):

With regard to voluntary eco-labelling programmes/schemes and criteria, based on non-product related PPMs, there is no consensus on the coverage by, application and obligations of, the TBT Agreement at this time. Nevertheless, with regard to these eco-labelling programmes/schemes, the CTE encourages WTO Members to follow the notification provisions of the TBT Agreement and its Code of Good Practice.

November 1 (drafting group):

As stated above, the CTE's discussion on eco-labelling has focussed primarily on voluntary eco-labelling programmes/schemes. Without prejudice to the coverage and application of the TBT Agreement to certain aspects of such voluntary eco-labelling programmes/schemes and criteria, i.e., those aspects concerning non-product related PPMs, and therefore to the obligations of Members under this Agreement regarding those aspects, the CTE recommends that WTO Members follow the provisions of the TBT Agreement and its Code of Good Practice, including those on transparency. In this context, the CTE underlines the particular importance of ensuring fair access of foreign producers to eco-labelling programmes/schemes.

November 8 (Final):

As stated above, the CTE's discussion on eco-labelling has focussed primarily on voluntary eco-labelling schemes/programmes and in particular on the transparency of such schemes/programmes. Without prejudice to the views of WTO Members concerning the coverage and application of the TBT Agreement to certain aspects of such voluntary eco-labelling schemes/programmes and criteria, i.e. those aspects concerning non-product-related PPMs, and therefore to the obligations of Members under this Agreement regarding those aspects, the CTE stresses the importance of WTO Members following the provisions of the TBT Agreement and its Code of Good Practice, including those on transparency. In this context, the CTE underlines the particular importance of ensuring fair access of foreign producers to eco-labelling schemes/programmes.

Annex D: Draft decision on ecolabelling (WT/CTE/W/38, G/TBT/W/30 24 July 1996)

The following draft decision is for discussion purposes to indicate the elements of any decision on ecolabelling that Canada believes important to include. This draft decision could either be a stand-alone decision or integrated into an omnibus Ministerial decision or resolution.

Ministers,

Recalling their Decision on Trade and Environment taken at Marrakesh on 15 April 1994 that recognized the need for rules to enhance positive interaction between trade and environmental measures for the promotion of sustainable development;

Recognizing that voluntary ecolabelling programs can be effective market-based policy instruments to encourage environmentally preferable products and services;

Acknowledging that ecolabelling programs are predominantly based upon life-cycle approaches;

Emphasizing that there should not be, nor need be, any policy contradiction between upholding and safeguarding an open, non-discriminatory and equitable multilateral trading system on the one hand, and acting for the protection of the environment, including by implementing and maintaining effective ecolabelling programs, on the other;

Desiring that ecolabelling programs be designed in such a manner as to ensure non-discrimination, and not create unnecessary obstacles to nor disguised restrictions on international trade;

Mindful of the need for all types of ecolabelling programs to have a transparent development process and to be based upon criteria that are verifiable, justifiable and scientifically-based;

Decide as follows:

1. Mandatory ecolabelling measures, voluntary ecolabelling measures, and ecolabelling compliance procedures are within the scope of the WTO Agreement on Technical Barriers to Trade (the "TBT Agreement") and its Code of Good Practice for the Preparation, Adoption and Application of Standards (the "Code of Good Practice").
2. The coverage applies to all ecolabelling programs, whether voluntary or mandatory, whether these be governmental (central or sub-central) or non-governmental.

3. For the purpose of the TBT Agreement, ecolabelling programs are established by standardizing bodies; therefore, such bodies should accept the TBT Code of Good Practice.
4. The Committee on Trade and Environment, jointly with the Committee on Technical Barriers to Trade, should, as part of its future work program, analyse the impact of the development of international standards based upon life-cycle approaches.
5. This Decision is not intended to prejudge whether measures related to non-product-related process and production methods are within the scope of that Agreement.

END NOTES

1. The EMIT group was created by the GATT Council in 1971 but was inactive until November 1991 when it was Chaired by the then Ambassador of Japan Ukawa. Once reactivated, the EMIT group was not a negotiating forum and had an agenda limited to three issues:

- i) trade provisions contained in existing multilateral environmental agreements vis-à-vis GATT principles and provisions;
- ii) multilateral transparency of national environmental regulations likely to have trade effects; and,
- iii) trade effects of new packaging and labelling requirements aimed at protecting the environment.

Notwithstanding the limited mandate, the EMIT group provided for the initial discussion of these "core" trade and environment issues that allowed for a more detailed elaboration of issues at Marrakesh and a Committee on Trade and Environment mandate that did not exclude negotiations on possible rule changes or modifications.

2. Ironically, the negotiations and preparations within NAFTA had limited crossover to policy deliberations in the WTO.

3. Particularly helpful was the clarification by the Appellate Body report of the criteria of the general exceptions (Article XX), particularly Article XX (g), as well as the discipline of the chapeau. The report made clear that the "necessity" test was limited to Article XX (b) in contrast to the less stringent test of "primarily directed at" test of Article XX (g). The report also made clear that a strict "effectiveness" test was inappropriate in the context of measures with long-term goals.

4. See WT/CTE/M/11 paragraph 52

5. Montreal Protocol, CITES and Basel Convention. NAFTA Article 104 only applies to the Basel Convention in the case of any dispute between Canada and Mexico, given that the USA has not ratified Basel.

6. Pending an agreed upon list or definition of hazardous materials, this meant that many materials such as scrap metals destined for recycling facilities in developing countries would be banned. From a WTO point of view, the distinction between OECD and non-OECD countries constitutes arbitrary discrimination.

7. Ironically, while there was interdepartmental agreement to drop the waiver in favour of guidelines, there was not explicit recognition that this would be in the context of Article XX. However, the point is somewhat academic given that the use of a guidelines approach would provide the guidelines under which an Article XX exception could be invoked.

8. While the advocates of the waiver approach noted that dispute settlement would still be available under a waiver as a "non-violation" case, in practice this would be meaningless given that any such waiver would have to be so explicit that non-violation would be virtually impossible to prove.

9. See Annex B.

10. This was in the context of lack of consensus on the definition of specific and non-specific measures.

11. The underlying trade-off in the MEA issue is between an accommodation for MEAs and a prohibition against unilateral measures (primarily by the USA). Again here as elsewhere, there was not enough on the negotiating table in terms of possible accommodation to allow for this trade-off to be put into play.

12. See WT/CTE/M/10
13. Of course, delegations that preferred minimalist results for the CTE did not share this view.
14. Central among these was an accommodation based upon Article XX (h), which pertains to international commodity agreements, which had been extensively discussed in the EMIT group but barely mentioned in the CTE. See TRE/W/17/Rev. 1 prepared by the Secretariat for the EMIT Group.
15. One key point which almost disappeared was implicit reference to the possibility of WTO-inconsistent measures under the general exceptions of Article XX.
16. The USA made the point in the formal CTE meeting that adopted the report that they do not agree that WTO Members always have the right.
17. Non-product related process and production methods (PPMs) refer to PPMs which are not reflected in the final article in hand. For example, paper has the same physical characteristics irrespective of forest management practices, bleaching processes, or level of recycled fibre content. From a GATT/WTO perspective, making such distinctions between products on the basis of how they are produced is in contraction with the fundamental concept of "like products" (or final article in hand) concept of Article III.
18. WT/CTE/W/21, G/TBT/W/21
19. See WTO/CTE/M/10 and 11
20. See minutes of the CTE September 11 meeting, WT/CTE/M/12 paragraphs 18, 19
21. The EU's initial reaction was that developing countries would not allow such an explicit reference but in the end, the quickness of the process and the absence of some key developing country delegations (e.g., Egypt, Mexico) resulted in rapid approval albeit with some disavowal later. As noted later, Mexico was particularly helpful in sharpening this language for the CTE report (Mexico's position was that the issue was not one of coverage of ecolabelling programs - they were covered - but whether non-product related PPMs were legal, see WT/CTE/M/10 paragraph 45)
22. The five elements were (November 1st draft):
 - a) market impact of eco-labelling, including with respect to SMEs;
 - b) access of foreign suppliers at all crucial stages in the development of eco-labelling programmes/schemes, and access of their products to the ecolabels granted by eco-labelling programmes/schemes;
 - c) the concepts of equivalency and mutual recognition including in relation to life cycle approaches, standards and conformity assessment procedures;
 - d) possible options to increase transparency; and
 - e) developments in international standardization and/or guidelines of environmental life-cycle approaches, environmental management standards and eco-labelling.
23. Ironically, ASEAN had made the suggestion as a substitute for the original sentence but in the marathon negotiating session, this ended up as an addition.
24. See Annex C for the evolution of the wording of the coverage paragraph.
25. See the non-papers presented by Argentina, Australia, EC, Japan and Korea.

26. At one point in time, the Chair asked the group whether or not they needed help - all heads rose from the table and said "no", indicating that consensus was close to being reached.

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- No. 2 Trends in FDI: A Comparison of Canada with the USA & Mexico,
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